Firdaus Khan bin Parit Khan & Anor v CIMB Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NO W-02(A)-475–03 OF 2021
RAVINTHRAN, WONG KIAN KHEONG AND AZIZUL AZMI ADNAN JJCA
4 JUNE 2024

Civil Procedure — Appeal — Record of appeal — Extension of time — Application for extension of time to file memorandum of appeal ('MA') — Objection by respondent — Whether second appellant could rely on alleged parties' agreement for extension of time to file MA — Whether there was mandatory requirement under r 18(7) of Rules of the Court of Appeal 1994 ('RCA') for appellant to file MA within 90 days from date of High Court's decision — Whether broad grounds of judgment of court would operate as binding precedent for purposes of principle of stare decisis — Whether appeal should be dismissed or struck out due to breach of r 18(7) of RCA — Whether court could resort to its inherent jurisdiction and/or inherent power — Rules of the Court of Appeal 1994 r 18(7) & (7A)

The respondent ('plaintiff') had filed a suit in the High Court against the appellants ('defendants'). On 23 February 2021, the High Court had delivered a decision in favour of the plaintiff against the defendants ('the High Court's decision'). In appealing against the High Court's decision to this court, the defendants on 17 May 2021 filed their record of appeal ('RA') within 90 days from the date of the High Court's decision ('90 days period'). However, the RA omitted the memorandum of appeal ('MA') because the High Court's written judgment or grounds of decision had not been provided by the learned High Court judge before the expiry of the 90 days period. Hence, the defendants could not prepare the MA and include it in the RA. The 90 days period lapsed on 24 May 2021. On 21 December 2023, the second defendant filed a notice of motion ('encl 7') for, among others, an extension of time for the second defendant to file a MA. The learned High Court judge provided a written judgment dated 20 March 2024 with regard to the High Court's decision. On 20 April 2024, the second defendant filed and served a supplemental RA ('SRA') which contained the High Court's written judgment and the MA. The plaintiff objected encl 7 on the grounds that: (a) r 18(7) of the Rules of the Court of Appeal 1994 ('RCA') imposed a mandatory obligation on the defendants to file the MA in the RA before the lapse of the 90 days period, with the plaintiff's reliance on, inter alia, the broad grounds of the decision in *Aliff Syukri Kamarzaman v Mohamad Syazwan bin Shuhaimi* (B-02(IM)(NCvC)-695–04 of 2022) (unreported) ('Aliff Syukri'); and (b) the second defendant was guilty of inordinate delay of almost two and

a half years ie from the date of filing of the RA to the date of filing of encl 7 and there was no reasonable explanation for the delay. The second defendant contended that (i) there was an agreement between the parties for the MA to be filed only after the defendants had received the High Court's written judgment ('alleged parties' agreement'); (ii) there would be a grave injustice to the defendants if encl 7 was dismissed but no prejudice to the plaintiff if encl 7 was allowed; and (iii) the Court of Appeal had inherent jurisdiction to allow encl 7 in the interest of justice.

Held, allowing encl 7:

(1) **(per Azizul Azmi Adnan JCA, concurring)** Rule 18(7A) of the RCA did not have the effect of supplanting the mandatory rule in r 18(7) of the RCA. Rule 18(7A) of the RCA should prevail over r 18(7) of the RCA as the use of the opening words 'Notwithstanding subrule (7)' in subrule 7A made it abundantly clear that subrule 7A was to prevail over subrule 7. The court in *Aliff Syukri* did not appear to consider the effect of these words. The ratio decidendi of a case in respect of which only broad grounds were issued would still operate as binding precedent for the purposes of the principle of stare decisis. The construction adopted by the court in *Aliff Syukri* could not be supported by the plain words employed in r 18(7A) of the RCA. The import of the words 'Notwithstanding subrule (7)' in sub-r (7A) did not appear to have been brought to the attention of the court in *Aliff Syukri* (see paras 8–10 & 13).

(2) **(per Wong Kian Kheong JCA)** The alleged parties' agreement could not be accepted. Rule 94 of the RCA only allowed parties to extend any time period stipulated in the RCA if there was 'consent in writing' between the parties. The second defendant was not able to produce any written consent of all the parties for an extension of time for the defendants to file the MA beyond the 90 days period. Furthermore, r 94 of the RCA only permitted one extension of time which could not exceed 14 days (see para 29).

(3) **(per Wong Kian Kheong JCA)** When the High Court's written judgment or grounds of decision had been prepared within the 90 days period, the employment of the imperative term 'shall' in r 18(7) of the RCA mandatorily required an appellant to file a RA which contained a MA within the 90 days period. However, when the High Court's written judgment or grounds of decision was only available after the expiry of the 90 days period, r 18(7) of the RCA did not mandatorily require an appellant to file a RA which contained a MA before the lapse of the 90 days period as r 18(7) of the RCA was subjected to r 18(7A) of the RCA due to the use of the word 'Notwithstanding' in r 18(7A) of the RCA. Rule 18(7A) of the RCA had expressly provided that an appellant 'shall' file the MA within three weeks after being notified of the availability of

the High Court's written judgment or grounds of decision. The view regarding r 18(7) and (7A) of the RCA did not cause any injustice to the plaintiff because the appeal had yet to be heard. No prejudice could be foreseen to the plaintiff in such circumstances (see paras 32–33).

(4) **(per Wong Kian Kheong JCA)** The broad grounds in *Aliff Syukri* were per incuriam r 18(7A) of the RCA. Consequently, the broad grounds in *Aliff Syukri* did not bind the court in deciding encl 7 (see para 38).

(5) **(per Wong Kian Kheong JCA)** According to r 102 of the RCA, the Court of Appeal could not allow the plaintiff's preliminary objection and the plaintiff's dismissal or striking out application solely on the ground that a breach of r 18(7) of the RCA had been committed. By virtue of r 3A of the RCA, the plaintiff's preliminary objection could only be allowed if the breach of r 18(7) of the RCA had caused 'a substantial miscarriage of justice' to the plaintiff. Further, the fact that the High Court's written judgment or grounds of decision was not available was a sufficient ground to explain the delay in filing a RA or SRA. If the plaintiff's preliminary objection or the plaintiff's dismissal or striking out application was allowed, there may be irreparable prejudice to the appellant as the appeal was dismissed or struck out without its merits being heard and decided by the court. The appellant could not be guilty of any delay, let alone inordinate delay, in filing a RA or SRA (see paras 40–41).

(6) **(per Wong Kian Kheong JCA)** If the court was conferred a power by an express statutory provision, the court could not then resort to the court's inherent jurisdiction and/or inherent powers. As r 93 of the RCA has expressly conferred a discretionary power on the court to decide encl 7, it could not therefore be acceded to the submission by the second defendant to invoke r 105 of the RCA, the Court of Appeal's inherent jurisdiction and/or inherent power (see paras 42–43).

[Bahasa Malaysia summary

Responden ('plaintif') telah memfailkan saman di Mahkamah Tinggi terhadap perayu ('defendan'). Pada 23 Februari 2021, Mahkamah Tinggi telah menyampaikan keputusan yang memihak kepada plaintif terhadap defendan ('keputusan Mahkamah Tinggi'). Dalam merayu terhadap keputusan Mahkamah Tinggi kepada mahkamah ini, defendan pada 17 Mei 2021 memfailkan rekod rayuan ('RR') mereka dalam tempoh 90 hari dari tarikh keputusan Mahkamah Tinggi ('tempoh 90 hari'). Walau bagaimanapun, RR tidak memasukkan memorandum rayuan ('MR') kerana penghakiman bertulis atau alasan keputusan Mahkamah Tinggi tidak diberikan oleh hakim Mahkamah Tinggi yang bijaksana sebelum tamat tempoh 90 hari. Oleh itu, defendan tidak dapat menyediakan MR dan memasukkannya ke dalam RR. Tempoh 90 hari itu luput pada 24 Mei 2021. Pada 21 Disember 2023,

defendan kedua memfailkan notis usul ('lampiran 7') antara lain, lanjutan masa untuk defendan kedua memfailkan MR. Hakim Mahkamah Tinggi yang bijaksana memberikan penghakiman bertulis bertarikh 20 Mac 2024 berkenaan dengan keputusan Mahkamah Tinggi. Pada 20 April 2024, defendan kedua memfailkan dan menyampaikan RR tambahan ('RRT) yang mengandungi penghakiman bertulis Mahkamah Tinggi dan MA. Plaintif membantah lampiran 7 atas alasan bahawa: (a) k 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') mengenakan kewajipan mandatori ke atas defendan untuk memfailkan MR dalam RR sebelum luputnya tempoh 90 hari, dengan pergantungan plaintif kepada, antara lain, alasan umum keputusan dalam *Aliff Syukri Kamarzaman v Mohamad Syazwan bin Shuhaimi* (B-02(IM)(NCvC)-695–04 of 2022) (unreported) ('Aliff Syukri'); dan (b) defendan kedua bersalah atas kelewatan melampau hampir dua setengah tahun iaitu dari tarikh pemfailan RR hingga tarikh pemfailan lampiran 7 dan tiada penjelasan munasabah bagi kelewatan itu. Defendan kedua berpendapat bahawa: (i) terdapat perjanjian antara pihak-pihak untuk MR difailkan hanya selepas defendan menerima penghakiman bertulis Mahkamah Tinggi ('perjanjian pihak yang didakwa'); (ii) akan wujud ketidakadilan yang berat kepada defendan jika lampiran 7 ditolak tetapi tiada prejudis kepada plaintif jika lampiran 7 dibenarkan; dan (iii) Mahkamah Rayuan mempunyai bidang kuasa sedia ada untuk membenarkan lampiran 7 demi kepentingan keadilan.

Diputuskan, membenarkan lampiran 7:

(1) **(oleh Azizul Azmi Adnan HMR, bersetuju)** Keadah 18(7A) KMR tidak mempunyai kesan menggantikan peraturan mandatori dalam k 18(7) KMR. Kaedah 18(7A) KMR sepatutnya mengatasi k 18(7) KMR kerana penggunaan perkataan pembukaan 'Walaupun subkaedah (7)' dalam subkaedah 7A menjelaskan dengan jelas bahawa subkaedah 7A adalah mengatasi subkaedah 7. Mahkamah di *Aliff Syukri* nampaknya tidak mempertimbangkan kesan kata-kata ini. Ratio decidendi kes yang hanya alasan umum dikeluarkan akan tetap beroperasi sebagai duluan mengikat untuk tujuan prinsip stare decisis. Tafsiran yang diterima pakai oleh mahkamah di *Aliff Syukri* tidak dapat disokong oleh perkataan biasa yang digunakan dalam k 18(7A) KMR. Penggunaan perkataan 'Walaupun subkaedah (7)' dalam subkaedah (7A) nampaknya tidak dibawa ke perhatian mahkamah di *Aliff Syukri* (lihat perenggan 8-10 & 13).]

(2) **(oleh Wong Kian Kheong HMR)** Perjanjian pihak yang didakwa tidak dapat diterima. Kaedah 94 KMR hanya membenarkan pihak melanjutkan mana-mana tempoh masa yang ditetapkan dalam KMR jika terdapat 'persetujuan bertulis' antara pihak. Defendan kedua tidak dapat mengemukakan sebarang kebenaran bertulis daripada semua pihak untuk lanjutan masa untuk defendan memfailkan MR melebihi tempoh

90 hari. Tambahan pula, k 94 KMR hanya membenarkan satu lanjutan masa yang tidak boleh melebihi 14 hari (lihat perenggan 29).

(3) **(oleh Wong Kian Kheong HMR)** Apabila penghakiman bertulis atau alasan keputusan Mahkamah Tinggi telah disediakan dalam tempoh 90 hari, penggunaan istilah imperatif 'hendaklah' dalam k 18(7) KMR secara mandatori memerlukan perayu memfailkan RR yang mengandungi MR dalam tempoh 90 hari. Walau bagaimanapun, apabila penghakiman bertulis atau alasan keputusan Mahkamah Tinggi hanya tersedia selepas tamat tempoh 90 hari, k 18(7) KMR tidak secara mandatori memerlukan perayu memfailkan RR yang mengandungi MR sebelum luput tempoh 90 hari kerana k 18(7) KMR tertakluk kepada k 18(7A) KMR kerana penggunaan perkataan 'walaupun' dalam k 18(7A) KMR. Kaedah 18(7A) KMR telah memperuntukkan secara jelas bahawa perayu 'hendaklah' memfailkan MR dalam tempoh tiga minggu selepas dimaklumkan tentang ketersediaan penghakiman bertulis atau alasan keputusan Mahkamah Tinggi. Pandangan berkenaan k 18(7) dan (7A) KMR tidak menyebabkan sebarang ketidakadilan kepada plaintif kerana rayuan masih belum didengar. Tiada prejudis boleh dilihat kepada plaintif dalam keadaan sedemikian (lihat perenggan 32–33).

(4) **(oleh Wong Kian Kheong HMR)** Alasan umum dalam *Aliff Syukri* adalah per incuriam k 18(7A) KMR. Akibatnya, alasan umum dalam *Aliff Syukri* tidak mengikat mahkamah dalam memutuskan lampiran 7 (lihat perenggan 38).

(5) **(oleh Wong Kian Kheong HMR)** Menurut k 102 KMR, Mahkamah Rayuan tidak boleh membenarkan bantahan awal plaintif dan permohonan penolakan atau pembatalan plaintif semata-mata atas alasan bahawa pelanggaran k 18(7) KMR telah dilakukan. Berdasarkan k 3A KMR, bantahan awal plaintif hanya boleh dibenarkan jika pelanggaran k 18(7) KMR telah menyebabkan 'kehilangan keadilan yang besar' kepada plaintif. Selanjutnya, fakta bahawa penghakiman bertulis atau alasan keputusan Mahkamah Tinggi tidak tersedia adalah alasan yang mencukupi untuk menjelaskan kelewatan dalam memfailkan RR atau RRT. Jika bantahan awal plaintif atau permohonan penolakan atau pembatalan plaintif dibenarkan, mungkin terdapat prejudis yang tidak boleh diperbaiki kepada perayu kerana rayuan itu ditolak atau dibatalkan tanpa meritnya didengar dan diputuskan oleh mahkamah. Perayu tidak boleh bersalah atas sebarang kelewatan, apatah lagi kelewatan yang melampau, dalam memfailkan RR atau RRT (lihat perenggan 40–41).

(6) **(oleh Wong Kian Kheong HMR)** Jika mahkamah telah diberikan kuasa melalui peruntukan berkanun yang nyata, mahkamah tidak boleh menggunakan bidang kuasa sedia ada mahkamah dan/atau kuasa sedia ada. Memandangkan k 93 KMR secara nyata telah memberikan kuasa budi bicara kepada mahkamah untuk memutuskan lampiran 7, maka ia

tidak boleh disertakan kepada penghujahan oleh defendan kedua untuk menggunakan k 105 KMR, bidang kuasa sedia ada dan/atau kuasa sedia ada Mahkamah Rayuan (lihat perenggan 42–43).]

Cases referred to

Aliff Syukri Kamarzaman v Mohamad Syazwan bin Shuhaimi (B-02(IM)(NCvC)-695–04 of 2022) (unreported), CA (not folld)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)

OCBC Bank (M) Bhd v Tan Eng Kwee and another application [2003] 6 MLJ 470; [2003] 3 CLJ 161, HC (refd)

Owners of the Ship or Vessel Sasacom I v Bank Pembangunan Malaysia Bhd [2015] 4 MLJ 841, CA (refd)

Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)

Viacor Asia Sdn Bhd v Arokiasamy a/l Thangaraju (Civil Appeal No B-02(IM)(NCC)-1690–09 of 2022) (unreported) (refd)

Young v Bristol Aeroplane Co, Limited [1944] KB 718, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96, 96(a)

Insolvency Act 1967 s 38(1)(a)

Rules of the Court 2012 O 14A

Rules of the Court of Appeal 1994 rr 1A, 3A, 18, 18(1), (7), (7A), 21, 21(3), 93, 94, 102, 105

Appeal from: Originating Summons No WA-24FC-418–03 of 2020 (High Court, Kuala Lumpur)

Hafizah Johor bt Ariff Johor (Malaysian Department of Insolvency) for the first appellant.

Kumaresan Thurairaju (with Azleen Farahannis Evani bt Azlan) (Thurairaj T Kumar & Assoc) for the second appellant.

Praveena Sivanandan (Seow & Megat) for the respondent.

Azizul Azmi Adnan JCA:

[1] I have had the benefit of reading in draft the grounds of judgment of Wong Kian Kheong JCA. I agree with the views of my learned brother. I address below the question of whether the broad grounds of judgment of a court would operate as binding precedent for the purposes of the principle of stare decisis.

[2] The background facts of the case are as set out in paras 28–38 in the judgment of Wong Kian Kheong JCA, and I respectfully adopt them here. A

[3] In *Aliff Syukri Kamarzaman v Mohamad Syazwan bin Shuhaimi* (B-02(IM)(NCvC)-695–04 of 2022) (unreported), the Court of Appeal struck out the defendant's appeal on account of failure by the defendant to file the memorandum of appeal within the time prescribed under r 18(7) of the Rules of the Court of Appeal 1994. The plaintiff respondent in that case had sued for (among others) for profits accrued in an unincorporated joint venture between the parties for the establishment of a restaurant known as Restoran Rumahmakan Terlajak Laris. The defendant counterclaimed, alleging that separate garnishee proceedings commenced at the magistrates court (commenced by a third party) had damaged the defendant's reputation. B C

[4] The plaintiff applied under O 14A of the Rules of the Court 2012 for the determination of three preliminary points of law. On 18 March 2022, the High Court determined the application in favour of the plaintiff and dismissed the defendant's counterclaim. The defendant appealed against this decision by way of a notice of appeal dated 14 April 2022. The defendant filed his memorandum of appeal on 7 July 2023 even though the full grounds of judgment of the High Court were not yet available. Nor was it available by the time the appeal came to be heard before the Court of Appeal. Trial of the main action was then on-going. D E

[5] Even though the full grounds of judgment of the High Court had not been issued by the time of the hearing of the appeal, the reasoning employed by the High Court was recorded in the e-Review system, by which the decision of the High Court was delivered. F

[6] Before the Court of Appeal, the plaintiff respondent in that case raised a preliminary objection, contending that there had been non-compliance with r 18 of the Rules of the Court of Appeal 1994. G

[7] The Court of Appeal upheld this preliminary objection. The following are the broad grounds of the Court of Appeal in *Aliff Syukri* as recorded in the minutes of the Case Management System ('CMS'): H

> This is our decision on preliminary objection raised by the respondent's counsel. We have considered the rival contention of both parties in respect of the preliminary objection. We have considered issues that have been raised and we come to unanimous decision. It is our considered view that the PO raised by the respondent has substance and merit in law and the facts as well as shown by chronology of events that have been referred to us. Order 18 Rule 7 of COA in our view is mandatory provision and calls for strict compliance. It is very clear the existence of Rule 7A is not in our view exception to mandatory requirement under Rule 7 one I

A of which is to file memorandum of appearance together with record of appeal there is no exception to that. Moreover, on the facts before us rule 7A cannot be invoked by the appellant as they were till today there is no ground of judgment received by the appellant. If ground of judgment received then there is prescribed period to file a memorandum of appeal this does not refer to memorandum of appeal that is
B required to be filed in the appeal record itself. Importantly from the record brief were in fact pronounced by the learned judge which to us are quite clear as to the reasons why the application was allowed by the learned judge. As such there was clearly no reasonable explanation for the non-filing of the memorandum of appeal as required at the first stage itself. Filing of the memorandum of appeal of an inordinate delay merely at the convenience of appellant on the basis that no full
C ground of judgment received would in our view set an unhappy precedent contrary to an intention and mischief of the Rules of Court of Appeal to promote fair and expeditious disposal of appeals. Hence, we are constrained to allow the preliminary objection raised by the respondent and accordingly struck out the appeal. Cost of RM2000.00 subject to allocator.

D

[8] In my considered view, the reasoning of the court in *Aliff Syukri* is clear, which was that r 18(7A) does not have the effect of supplanting the mandatory rule in r 8(7). Subrule 7 requires the memorandum of appeal to be filed within
E 90 days of the decision of the High Court.

[9] My learned brother Wong Kian Kheong JCA is of the view that — and I fully agree — r 18(7A) should prevail over r 18(7). This is because of the plain words employed in the provisions. The use of the opening words
F 'Notwithstanding subrule (7)' in sub-r 7A makes it abundantly clear that sub-r 7A is to prevail over sub-r 7. The court in *Aliff Syukri* did not appear to consider the effect of these words.

[10] Whether or not the broad grounds of judgment of a court may contain
G binding ratio decidendi must depend on a proper reading of the broad grounds issued in each case. The broad grounds of a case may contain a complete analysis of the issues at hand, but may omit a complete narration of the background facts. This should not relegate the grounds so issued into some lesser category of judgment. Thus, in my view, the ratio decidendi of a case in
H respect of which only broad grounds were issued will still operate as binding precedent for the purposes of the principle of stare decisis as explained in *Young v Bristol Aeroplane Co, Limited* [1944] KB 718, and as applied by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645.

I

[11] Where, however, the Court of Appeal is presented with two conflicting prior decisions of the Court of Appeal, the court would be well entitled to prefer the decision containing the full grounds of judgment of the court, over the decision delivered only with broad grounds.

[12] The Federal Court in *Dalip Bhagwan* explained the three exceptions to the general rule of stare decisis in the following manner:

> [T]he relevant *ratio decidendi* in *Young v Bristol Aeroplane*'s case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords.

[13] In the present case, I was constrained to find that the first of the exceptions applied, as the construction adopted by the court in *Aliff Syukri* cannot be supported by the plain words employed in r 18(7A) of the Rules of Court 1994. As explained, the import of the words 'Notwithstanding subrule (7)' in subrule(7A) did not appear to have been brought to the attention of the court in *Aliff Syukri*. Had it been, I am assured that court would have arrived at a different conclusion.

Wong Kian Kheong JCA:

A. INTRODUCTION

[14] This judgment discusses the following questions:

(1) whether r 18(7) of the Rules of the Court of Appeal 1994 ('the RCA') has imposed a mandatory requirement for an appellant to file a record of appeal ('RA') which contains a memorandum of appeal ('MA') within 90 days from the date of the High Court's decision ('90 days period (filing of RA)') when the High Court's 'written judgment or grounds of decision' ('High Court's written judgment/grounds of decision') is not available before the lapse of the 90 days period (filing of RA). This issue also concerns the following matters:

   (a) an interpretation of rr 1A, 18(1) and (7A) of the RCA; and

   (b) from the view point of the 'stare decisis' doctrine, whether the 'broad grounds' ('broad grounds') of the Court of Appeal's decision in *Aliff Syukri bin Kamarzaman v Mohamad Syazwan bin Shuhaimi* Civil Appeal No B-02(NCvC)-695–04 of 2022 (*Aliff Syukri*) binds the Court of Appeal with regard to the construction of r 18(7) and (7A) of the RCA.

(2) if:

(a) r 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA before the expiry of the 90 days period (filing of RA); and

(b) the appellant has filed a RA within the 90 days period (filing of RA) but the RA does not contain the MA because the High Court's written judgment/grounds of decision is not available before the lapse of the 90 days period (filing of RA),

– can the respondent raise a preliminary objection ('respondent's PO') or apply to the Court of Appeal to dismiss or strike out the appeal solely on the ground that the appellant has failed to comply with the mandatory r 18(7) of the RCA ('respondent's dismissal/striking out application')?

When the respondent's PO has been raised or when the respondent's dismissal/striking out application has been filed, whether the appellant can file an application to the Court of Appeal pursuant to r 93 of the RCA for an order to enlarge the 90 days period (filing of RA) so as to allow the appellant to file a supplemental RA ('SRA') which contains the High Court's written judgment/grounds of decision and MA.

B. BACKGROUND

[15] I shall refer to the parties as they were in the High Court.

[16] The plaintiff bank ('plaintiff') had filed a suit in the High Court against the defendants ('defendants').

[17] On 23 February 2021, the High Court had delivered a decision in favour of the plaintiff against the defendants ('High Court's decision').

[18] The defendants appealed to the Court of Appeal against the High Court's decision ('this appeal').

[19] The defendants filed their RA on 17 May 2021 (within the 90 days period (filing of RA)). However, the RA omitted the MA. This was because the High Court's written judgment/grounds of decision had not been provided by the learned High Court judge (as he then was) before the expiry of the 90 days period (filing of RA). Hence, the defendants could not prepare the MA and include it in the RA.

[20] The 90 days period (filing of RA) lapsed on 24 May 2021.

[21] The first defendant ('first defendant') was adjudicated by the court as a bankrupt on 22 September 2023. In this appeal, Puan Hafizah Johor bt Ariff

Johor, a legal officer attached to the Malaysian Department of Insolvency, represented the first defendant. The Director General of Insolvency had given a sanction for the first defendant to proceed with this appeal pursuant to s 38(1)(a) of the Insolvency Act 1967.

[22] On 21 December 2023, the second defendant ('second defendant') filed a notice of motion in the Court of Appeal (encl 7). Enclosure 7 had applied for, among others, an extension of time from the Court of Appeal for the second defendant to file a MA which had been exhed as exh 'AAR1' ('MA (second defendant's affidavit)') in an affidavit affirmed by the second defendant on 21 December 2023 (filed in support of encl 7).

[23] At the time of the filing of encl 7, the High Court's written judgment/grounds of decision was not available.

[24] The learned High Court judge provided a written judgment dated 20 March 2024 with regard to the High Court's decision ('High Court's written judgment (this appeal)').

[25] On 20 April 2024, the second defendant filed and served a SRA which contained the following documents:

(1) the High Court's written judgment (this appeal); and

(2) the MA.

C. SUBMISSION OF PARTIES

[26] The plaintiff's learned counsel, Ms Praveena Sivanandan, had objected to encl 7 on the following grounds:

(1) r 18(7) of the RCA employs an imperative term 'shall'. Consequently, r 18(7) of the RCA imposes a mandatory obligation on the defendants to file the MA in the RA before the lapse of the 90 days period (filing of RA). The plaintiff's learned counsel had relied on three Court of Appeal's decisions, namely:

   (a) the judgment of Abdul Wahab Patail JCA in *Owners of the Ship or Vessel Sasacom I v Bank Pembangunan Malaysia Bhd* [2015] 4 MLJ 841 (*Sasacom*);

   (b) the broad grounds in *Aliff Syukri* and

   (c) *Viacor Asia Sdn Bhd v Arokiasamy a/l Thangaraju* (Civil Appeal No B-02(IM)(NCC)-1690–09 of 2022) (unreported) (*Viacor*).

(2) the second defendant was guilty of inordinate delay of almost 2 1/2 years (from the date of filing of the RA (17 May 2021) to the date of filing of

encl 7 (21 December 2023)) ('second defendant's delay (filing encl 7)') and there was no reasonable explanation for the second defendant's delay (filing of encl 7).

[27] Mr Kumaresan a/l Thurairaju, the second defendant's learned counsel, had advanced the following contentions in support of encl 7:

(a) there was an agreement between the parties' solicitors for the MA to be filed only after the defendants had received the High Court's written judgment (this appeal) ('alleged parties' agreement (extension of time to file MA)');

(b) the plaintiff was estopped from denying the alleged parties' agreement (extension of time to file MA);

(c) if encl 7 is dismissed by the Court of Appeal, there would be a grave injustice to the Defendants. This is because this appeal would be dismissed by the Court of Appeal without considering the merits of this appeal. If the Court of Appeal however allows encl 7, there is no prejudice to the plaintiff because the plaintiff is still entitled to resist this appeal on its merits;

(d) the Court of Appeal has inherent jurisdiction to allow encl 7 in the interest of justice; and

(e) this appeal has merits as is evident in the MA (second defendant's affidavit). In any event, the SRA (which contained the MA) had now been filed in court enclosure No 25.

D. CAN SECOND DEFENDANT RELY ON ALLEGED PARTIES' AGREEMENT (EXTENSION OF TIME TO FILE MA)?

[28] Rule 94 of the RCA provides as follows:

> R 94 *Enlargement of time by consent.*
>
> *The time for* delivering, amending, or *filing any document may be enlarged once only by consent in writing without application to the Court or a Judge, but such enlargement shall not exceed fourteen days*. (Emphasis added.)

[29] I am not able to accept the alleged parties' agreement (extension of time to file MA). Firstly, r 94 of the RCA only allows parties to extend any time period stipulated in the RCA if there is 'consent in writing' between the parties. The second defendant is not able to produce any written consent of the solicitors of all the parties in this appeal for an extension of time for the defendants to file the MA beyond the 90 days period (filing of RA). Furthermore, r 94 of the RCA only permits one extension of time which cannot exceed 14 days.

E. IS THERE A MANDATORY REQUIREMENT UNDER R 18(7) OF THE RCA FOR AN APPELLANT TO FILE MA WITHIN 90 DAYS PERIOD (FILING OF RA)?

[30] I reproduce below rr 1A, 3A, 18, 21, 93, 102 and 105 of the RCA:

r 1A *Court or Judge shall have regard to justice*

In administering any of [RCA] herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of [RCA] herein.

r 3A *Preliminary objection on the ground of non-compliance shall not be allowed*

A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of [RCA] unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

r 18 *Memorandum of appeal*

(1) *The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided* such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

(3) *The memorandum of appeal shall be substantially in Form 3 in the First Schedule*.

(4) *The appellant shall attach to such memorandum copies of the proceedings in the High Court*, including —

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) *a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal*; and

(f) a copy of the notice of appeal.

(5) The memorandum of appeal and the copies of the documents specified in subrule (4) shall be clear and legible. The Registrar may reject any memorandum and the copies of the said document, if in his opinion they are not clear or illegible.

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

(7) *The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given*.

(7A) *Notwithstanding subrule (7), if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within ninety days from the date on which the decision appealed against was given, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability*.

(7B) *Notwithstanding subrules (7) and (7A), if any copy of the documents specified in paragraph (4)(b) or (e) is not available after ninety days from the date on which the decision appealed against was given, the court may order the appellant to proceed with his appeal*.

(8) Sufficient copies of the record of appeal for the use of the Judges of the Court shall be sent to the Registrar when the record of appeal is filed.

(9) The appellant shall within the time limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

(10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.

r 21 *Amendments*

(1) *The Court may at any time allow amendment of* any notice of appeal, or notice of cross-appeal, or *memorandum of appeal*, or other part of the record of appeal *on such terms as it thinks fit*.

(2) *If the memorandum of appeal is not drawn up in the prescribed manner, the appeal may be dismissed*.

(3) *If any part of the record of appeal is not filed*, or any copy thereof is not supplied *within the prescribed time, and no sufficient ground is shown for the delay, the appeal may be dismissed*.

r 93 *Power of Court or Judge to enlarge* or abridge *time.*

The Court or a Judge shall have power to enlarge or abridge *the time appointed by [RCA]*, or fix by an order enlarging time, *for doing any act* or taking any proceeding, *upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed*:

Provided that when the time for delivering any pleading or *document* or filing any affidavit, answer or document, or doing any act is or *has been fixed or limited by any of [RCA]* or by any direction on or under the summons for directions or by an order of the Court or a Judge *the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application*.

r 102 *Non-compliance with [RCA] not to render proceedings void*

Non-compliance with any of [RCA], or with any rule of practice for the time being in force*, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit*.

r 105 *Inherent powers of the Court.*

For the avoidance of doubt, it is declared that nothing in [RCA] shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (Emphasis added.)

[31] I will discuss the following three scenarios:

(1) the first scenario ('first scenario') is when the High Court's written judgment/grounds of decision has been prepared within the 90 days period (filing of RA);

(2) in the second scenario ('second scenario'), the High Court's written judgment/grounds of decision is only available after the expiry of the 90 days period (filing of RA); and

(3) the High Court's written judgment/grounds of decision is not available for whatever reason ('third scenario').

[32] In the first scenario, I am of the following opinion:

(1) in view of the employment of the imperative term 'shall' in r 18(7) of the RCA, r 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA within the 90 days period (filing of RA); and

(2) if an appellant fails to comply with r 18(7) of the RCA, the appellant may apply to the Court of Appeal under r 93 of the RCA for an extension of time ('appellant's application (extension of time)') to file a SRA which contains the High Court's written judgment/grounds of decision and MA — please refer to para 41 below.

[33] With regard to the second scenario, I am of the view that r 18(7) of the RCA does not mandatorily require an appellant to file a RA which contains a MA before the lapse of the 90 days period (filing of RA). This view is supported by the following reasons:

(1) r 18(7) of the RCA is subject to r 18(7A) of the RCA due to the use of the word 'Notwithstanding' employed by the Rules Committee in r 18(7A) of the RCA. The effect of the term '*notwithstanding*' has been explained by Low Hop Bing J (as he then was) in the High Court case of *OCBC Bank (M) Bhd v Tan Eng Kwee and another application* [2003] 6 MLJ 470 at p 475; [2003] 3 CLJ 161 at p 165, as follows:

> *The phrase 'Notwithstanding sub-s (2)' in s 8(2A) [of the then named Bankruptcy Act 1967] means that s 8(2) is to be disregarded in so far as it is inconsistent with s 8(2A) so that the provisions of s 8(2A) shall prevail and play a predominant role to the exclusion of s 8(2) which has been rendered subservient to s 8(2A).* (Emphasis added.)

(2) r 18(7A) of the RCA has expressly provided that in the second scenario, an appellant 'shall' file the MA within three weeks after being notified of the availability of the High Court's written judgment/grounds of decision ('three weeks period (r 18(7A) of the RCA)'). If r 18(7) of the RCA is mandatory in the second scenario, this will render r 18(7A) of the RCA redundant;

(3) r 18(7A) of the RCA has been inserted by the Rules Committee with effect from 1 August 2012 by way of the Rules of the Court of Appeal (Amendment) 2012 (PU (A) 234/12) ('2012 Amendment (RCA)'). In the case of the second scenario, if r 18(7) RCA mandatorily requires an appellant to file a RA which contains a MA before the lapse of the 90 days period (filing of RA), this will defeat the purpose of the 2012 Amendment (RCA) which has expressly inserted r 18(7A) of the RCA;

(4) r 1A of the RCA provides that in the administration of the RCA, including r 18(7) and (7A) of the RCA, the Court of Appeal 'shall have regard to the justice of the particular case and not only to the technical non-compliance' of r 18(7) of the RCA.

With regard to the second scenario, it is only in the interest of justice for an appellant to file a SRA (containing the High Court's written judgment/grounds of decision and MA) within the three weeks period (r 18(7A) of the RCA). This is because according to r 18(1) RCA, a MA 'shall' set 'forth concisely and under distinct heads, ... the grounds of objection to the decision appealed against, and specifying the points of law or fact which are

alleged to have been wrongly decided' by the High Court. How can an appellant draft a MA when the High Court's written judgment/grounds of decision is not available? Furthermore, the High Court may not provide any oral reason when the High Court's decision is delivered. In such a situation, an appellant is hard pressed to draft a MA and the MA may consist of the speculation of the appellant's learned counsel on how the High Court's decision is arrived at and how the learned High Court judge or judicial commissioner has erred in fact and/or in law ('appellant's speculation'). Accordingly, the above interpretation of r 18(1), (7) and (7A) of the RCA is in consonance with justice as mandated by r 1A of the RCA;

(5) the above construction of r 18(7) and (7A) of the RCA is supported by the following practical considerations:

(a) if r 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA before the expiry of the 90 days period (filing of RA):

(i) within the 90 days period (filing of RA), a RA has to be filed which contains a MA (that may comprise the appellant's speculation). Upon an appellant's failure to comply with r 18(7) RCA, the appellant's application (extension of time) has to be filed;

(ii) after the High Court's written judgment/grounds of decision is available, an appellant may file a notice of motion for leave of the Court of Appeal under r 21(1) of the RCA to amend the MA based on the High Court's written judgment/grounds of decision ('amendment application (MA)'); and

(iii) the respondent may object to the appellant's application (extension of time) or amendment application (MA).

(b) if r 18(7A) of the RCA prevails over r 18(7) of the RCA:

(i) an appellant is only required to file a RA (without a MA) within the 90 days period (filing of RA); and

(ii) when the appellant receives the High Court's written judgment/grounds of decision, the appellant is only obliged to file a SRA (containing the High Court's written judgment/grounds of decision and MA) within the three weeks period (r 18(7A) of the RCA).

(c) the following practical benefit may ensue from the above interpretation of r 18(7) and (7A) of the RCA:

(i) the Court of Appeal is not unduly burdened by the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA);

(ii) appellants do not have to prepare MAs without the benefit of the High Court's written judgment/grounds of decision; and

(iii) both the appellants and respondents need not expend time, effort and costs in respect of the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA).

(6) the above view regarding r 18(7) and (7A) of the RCA does not cause any injustice to a respondent because the appeal has yet to be heard. I am unable to foresee any prejudice to a respondent in such circumstances. Furthermore, when the appeal is subsequently heard, the respondent is still entitled to oppose the appeal on its merits to the hilt; and

(7) cases decided before the introduction of r 18(7A) of the RCA have to be read with caution.

[34] With respect to the following two Court of Appeal cases relied on by the plaintiff's learned counsel:

(1) the facts in *Sasacom* did not concern the application of r 18(7) and (7A) of the RCA; and

(2) in *Viacor*, the 'Case Management System' ('CMS') records showed that on 14 September 2023, the Court of Appeal (comprising Hanipah Farikullah, See Mee Chun and Dr Choo Kah Sing JJCA) had allowed the appellant's application for, among others, an order that the filing of the SRA (containing the MA) after the expiry of the 90 days period (filing of RA) was valid and deemed to have complied with r 18(7) and (7A) RC. In any event, the Court of Appeal has not delivered a written judgment in *Viacor*.

[35] In the third scenario, ie, the High Court's written judgment/grounds of decision is not available at all, I am of the following view:

(1) r 18(7B) of the RCA empowers the Court of Appeal to order an appellant to proceed with the appeal ('order (appeal without High Court's written judgment/grounds of decision)'); and

(2) even though the appellant does not have the benefit of the High Court's written judgment/grounds of decision, the order (appeal without High Court's written judgment/grounds of decision) should include an order for the appellant to file a MA. In the exceptional circumstances as in the third scenario, the MA will then assist the parties and the Court of Appeal to decide the appeal when the High Court's written judgment/grounds of decision is not available.

F. EFFECT OF BROAD GROUNDS

[36] In *Aliff Syukri*, the Court of Appeal has delivered the following broad grounds (quoted verbatim in its entirety based on CMS records):

> *This is our decision on preliminary objection raised by the respondent's counsel. We have considered the rival contention of both parties in respect of the preliminary objection. We have considered issues that have been raised and we come to unanimous decision. It is our considered view that the PO raised by the respondent has substance and merit in law and the facts as well as shown by chronology of events that have been referred to us. Order 18 Rule 7 of COA [sic] in our view is mandatory provision and calls for strict compliance. It is very clear the existence of Rule 7A [sic] is not in our view exception to mandatory requirement under Rule 7 [sic] one of which is to file memorandum of appearance together with record of appeal there is no exception to that. Moreover, on the facts before us rule 7A [sic] cannot be invoked by the appellant as they were till today there is no ground of judgment received by the appellant. If ground of judgment received then there is prescribed period to file a memorandum of appeal this does not refer to memorandum of appeal that is required to be filed in the appeal record itself. Importantly from the record brief were in fact pronounced by the learned judge which to us are quite clear as to the reasons why the application was allowed by the learned judge. As such there was clearly no reasonable explanation for the non-filing of the memorandum of appeal as required at the first stage itself. Filing of the memorandum of appeal of an inordinate delay merely at the convenience of appellant on the basis that no full ground of judgment received would in our view set an unhappy precedent contrary to an intention and mischief of the Rules of Court of Appeal to promote fair and expeditious disposal of appeals. Hence, we are constrained to allow the preliminary objection raised by the respondent and accordingly struck out the appeal. Cost of RM2,000.00 subject to allocator.* (Emphasis added.)

[37] Firstly, broad grounds are important for the following reasons:

(1) broad grounds provide a summary of the reasons for the decisions of the Court of Appeal. All the parties to an appeal to the Court of Appeal and their learned counsel (especially the party who is not successful in the appeal), are entitled to know the reasons for the Court of Appeal's decision, especially when the appeal emanates from a subordinate court and the decision of the Court of Appeal is therefore final;

(2) if an appeal to the Court of Appeal originates from the High Court, by way of the broad grounds, all the parties to an appeal and their learned counsel can make an informed decision on whether to file an application to the Federal Court for leave to appeal against the Court of Appeal's decision ('leave application (Federal Court)'); and

(3) broad grounds may assist the Federal Court to decide leave applications (Federal Court).

[38] Initially, from the view point of the stare decisis doctrine, I had my doubts on whether a ratio decidendi can be extracted from broad grounds. I have however been provided with a draft judgment prepared by my learned brother, Azizul Azmi Adnan JCA ('Azizul Azmi Adnan JCA's judgment'). Having read Azizul Azmi Adnan JCA's judgment, I agree with its contents that, with the greatest respect, the broad grounds in *Aliff Syukri* are *per incuriam* r 18(7A) of the RCA. Consequently, the broad grounds in *Aliff Syukri* do not bind this Court of Appeal in deciding encl 7.

G. SHOULD COURT OF APPEAL DISMISS OR STRIKE OUT APPEAL MERELY DUE TO APPELLANT'S BREACH OF R 18(7) OF THE RCA?

[39] I will now assume that r 18(7) of the RCA is mandatory and has been breached by an appellant ('breach (r 18(7) of the RCA)'). In the event of abreach (r 18(7) of the RCA), how should the Court of Appeal decide on the following matters:

(1) the respondent's PO;

(2) the respondent's dismissal/striking out application; and

(3) the appellant's application (extension of time)?

[40] Firstly, with regard to the respondent's PO and respondent's dismissal/striking out application, I express the following opinion:

(1) according to r 102 of the RCA, a breach (r 18(7) of the RCA) 'shall not render any proceedings void'. In other words, the Court of Appeal cannot allow the respondent's PO and respondent's dismissal/striking out application solely on the ground that a Breach breach (r 18(7) of the RCA) has been committed;

(2) by virtue of r 3A of the RCA, the respondent's PO can only be allowed if the breach (r 18(7) of the RCA) has caused 'a substantial miscarriage of justice' to the respondent. As explained in the above sub-para 33(6), I am not able to see any prejudice, let alone a substantial miscarriage of justice, which can be caused to the respondent due to the breach (r 18(7) of the RCA);

(3) r 21(3) of the RCA only allows the Court of Appeal to dismiss an appeal due to a delay in the filing of a RA if 'no sufficient ground is shown for the delay'. The fact that the High Court's written judgment/grounds of decision is not available is a sufficient ground to explain the delay in filing a RA or SRA which contains the High Court's written judgment/grounds of decision and MA;

(4) if the respondent's PO or respondent's dismissal/striking out application is allowed ('Court of Appeal's dismissal/striking out (appeal)'), there may be irreparable prejudice to the appellant as follows:

(a) the appeal is dismissed or struck out without its merits being heard and decided by the Court of Appeal;

(b) if the appeal originates from a subordinate court, the Court of Appeal's dismissal/striking out (appeal) is final; or

(c) if the appeal emanates from the High Court, the appellant has no right under s 96(a) of the Courts of Judicature Act 1964 ('the CJA') to apply to the Federal Court for leave to appeal against the Court of Appeal's dismissal/striking out (appeal). Section 96 of the CJA is reproduced below:

> s 96 *Conditions of appeal.*
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, *an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —*
>
> (a) *from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage*; or
>
> from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision. (Emphasis added.)

An appellant cannot apply to the Federal Court for leave to appeal against the Court of Appeal's dismissal/striking out (appeal) because the Court of Appeal's dismissal/striking out (appeal) is not a 'judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction' within the meaning of s 96(a) of the CJA; and

(5) if the breach (r 18(7) of the RCA) has occasioned any prejudice to the respondent, the court should consider the fact that such a prejudice may be compensated in the form of costs to be paid by the appellant to the respondent.

[41] With regard to the appellant's application (extension of time), the following matters are pertinent:

(1) the delay in filing the MA may have been caused solely by the non-availability of the High Court's written judgment/grounds of decision. In such a case, the appellant cannot be guilty of any delay, let

alone inordinate delay, in filing a RA or SRA which contains the High Court's written judgment/grounds of decision and MA;

(2) if the court allows the appellant's application (extension of time), there is no injustice to the respondent — please refer to the above sub-para 33(6). Even if there is any prejudice caused to the respondent, such a prejudice may be compensated by an order of costs to be paid by the appellant to the respondent; and

(3) if the appellant's application (extension of time) is refused, there will be an injustice to the appellant as explained in the above sub-para 40(4).

H. CAN COURT OF APPEAL RESORT TO R 105 OF THE RCA, ITS INHERENT JURISDICTION AND/OR INHERENT POWER TO DECIDE ENCL 7?

[42] It is clear from the following two judgments of our highest courts that if the court is conferred a power by an express statutory provision, the court cannot then resort to the court's inherent jurisdiction and/or inherent powers:

(1) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, at 181; and

(2) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307, at [28].

[43] As r 93 of the RCA has expressly conferred a discretionary power on the Court of Appeal to decide encl 7, I cannot therefore accede to the submission by the second defendant's learned counsel for this court to invoke r 105 of the RCA, the Court of Appeal's inherent jurisdiction and/or inherent power.

I. OUTCOME OF ENCL 7

[44] I have no hesitation to apply r 93 of the RCA and allow encl 7. The following reasons support this exercise of discretion:

(1) the second defendant's delay in filing the SRA (which contained the High Court's written judgment (this appeal) and MA) in this case was due solely to the non-availability of the High Court's written judgment (this appeal). In other words, the second defendant was not guilty of any indolence;

(2) by allowing encl 7, no prejudice is caused to the plaintiff because:

(a) the plaintiff has not filed any written submission to oppose this appeal; and

(b) no hearing date has been fixed for this appeal.

(3) the second defendant has now filed the SRA and the hearing of this appeal will not be delayed any further; and

(4) if there is any prejudice caused to the plaintiff by the court's granting of encl 7, such a prejudice can be compensated by costs to be paid by the second defendant to the plaintiff.

[45] Premised on the above reasons, encl 7 is allowed with the following order:

(1) an extension of time and leave of the Court of Appeal is granted for the second defendant to file the SRA (which included the MA); and

(2) the second defendant shall pay costs of encl 7 in a sum of RM2,000 to the plaintiff.

[46] I have forwarded a draft copy of this judgment to my learned brothers, Ravinthran N Paramaguru and Azizul Azmi Adnan JJCA. Both of them have expressed their concurrence with this judgment.

Enclosure 7 allowed.

Reported by Nabilah Syahida Abdullah Salleh